

## OPINION

Relevant for: Indian Polity & Constitution | Topic: Judiciary: Structure, Organisation & Functioning

In *Navtej Johar vs Union of India*, the Supreme Court gave the entire nation a reason to rejoice by partially striking down Section 377 for violating the rights to equality, free speech and life under Articles 14, 19(1)(a) and 21 of the Constitution. The Court redeemed itself by grounding its reasoning in constitutional morality and placing it above social morality.

A quick perusal through the judgment leaves one struck by how often the words “consent” and “consensual” appear in the justices’ reasoning (over a hundred times each). The word “dignity” appears even more frequently (over 200 times). While the constitutional importance of dignity and consent has been noted for civil rights, little has been said about rooting economic rights and freedoms in dignity and consent. Given the foundation created by the Supreme Court in *Johar*, it is most pertinent at this point to recognize the dignity and privacy of workers and entrepreneurs.

Indian courts have historically done a poor job of protecting the economic rights and freedoms of workers and entrepreneurs because of a socialist mindset that gave deference to the arbitrary licensing regimes. But not protecting the dignity of labour and human capital is also a kind of arbitrariness leading to the marginalization of millions of workers. In the post-*Johar* world, I believe this kind of economic marginalization is no longer consistent with the Supreme Court’s jurisprudence.

Article 19(1)(g) gives all citizens the right to “practice any profession, or to carry on any occupation, trade, or business” and is subject to some reasonable restrictions made by the state to preserve public interest under Article 19(6). How do the principles in *Johar* apply to economic rights and freedoms in Article 19(1)(g)?

How does *Johar* apply to sex workers? The *Johar* opinion is fundamentally rooted in two principles—the right of adults to consent and their pursuit of life and liberty with dignity and privacy in matters including sexual expression. It seems arbitrary that sex work is not held to the same standard. If behaviour by consenting adults in same-sex relations is protected by the Constitution, it is unclear why behaviour by consenting adults in transactional-sex relations (same-sex or otherwise) should remain unprotected. If social morality regarding obscenity, tradition and unnatural behaviour have little place in constitutional morality for freedom of expression, why does the standard change with respect to economic rights? If applied consistently, the principles in the *Johar* opinion cannot uphold the current restrictions on sex workers as constitutional.

There is a trade-off between preserving social mores and individual rights, and in *Johar*, the court has wisely decided that the latter will trump the former. Then, why are the individual rights of a dance bar worker, or a sex worker, or a restaurant owner any different? Are they not deserving of the same dignity and privacy as the rest of us?

If one can agree that transactional sex relations must receive the same protections, then it is quite possible to extend it to other kinds of transactions, like the sale and purchase of alcohol or beef. If adults can be trusted to engage in one kind of activity—in the *Johar* case, consensual sexual relations—what is the constitutional reasoning for preventing individuals from engaging in other activities involving consenting adults? With regard to an alcohol trader who only sells alcohol to adults, not by force but through exchange, what is the post-*Johar* constitutional reasoning to leave the dignity of his work, his labour, and his right to pursue any trade or

occupation unprotected in prohibition states like Gujarat, Nagaland, and Bihar?

The usual argument against prohibition of alcohol or beef is the freedom of expression through the choice of food and drink. It is usually understood as an infringement on the freedom of expression of beef eaters versus the morality of those wanting to protect cows. But what about the rights and the dignity of the butcher? Do they not have the right to choose their profession and sell the fruits of their labour to others through exchange? Rooting dignity and privacy in its relation to the freedom of expression recognizes one kind of constitutional protection—protecting the consumer of alcohol or beef. But how can we enjoy our freedom of expression through our choice of food or drink if we suppress the rights of those who use their labour to produce those goods and services? It is equally important to root dignity and privacy in economic rights and freedoms of the producer.

*Johar* rightly recognizes that dignity is crucial for preserving individual rights and that consenting adults cannot be criminalized for their sexual expression. It is inconsistent and arbitrary to not extend this important protection to economic rights and freedoms. Criminalizing those who wish to sell alcohol, beef, sexual services, or any services to consenting adults is an attack on the dignity of the labour and livelihood of the millions engaged in these industries. If we continue the stepchild treatment of economic rights and freedoms, millions of Indians will continue to be marginalized in the same shameful way we treated the LGBTQ community for 70 years.

Constitutional morality has little meaning without constitutional consistency. It is time to extend protections arising from *Johar* to economic rights rooted in article 19(1)(g) and limit state coercion to protect the dignity of marginalized professions.

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